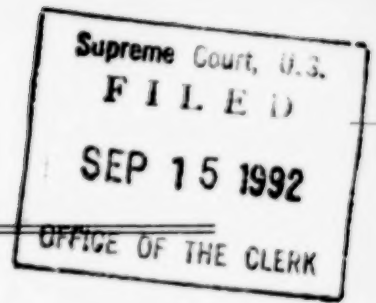


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No. 92-94



In The  
**Supreme Court of the United States**  
October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and  
wife; JAMES ZOBREST, a minor, by LARRY and  
SANDRA ZOBREST, his parents,

*Petitioners,*

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

*Respondent.*

**Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

**PETITIONER'S REPLY TO BRIEF IN OPPOSITION**

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## REPLY TO BRIEF IN OPPOSITION

The respondent, in its Brief In Opposition To Petition For Writ of Certiorari (hereinafter, "Br."), presents three principal arguments as to why the writ should be denied: (1) that the EHA did not require respondent to provide services to any handicapped child on the grounds of any private school (hence reversal of the decision below would not dispose of the case) (Br. 3), (2) that there is no dispute among circuits or courts which have considered the constitutional issues presented by this case (Br. 5-6), (3) that the decision below is consistent with Supreme Court precedents (Br. 6-12).

### I. JAMES ZOBREST WAS STATUTORILY ENTITLED TO RECEIVE THE INTERPRETER SERVICES REQUESTED.

That was necessarily the conclusion of the majority and minority of the court below. The opinions of neither raised any question of statutory entitlement and saw the sole question in the case to be that posed by the Establishment Clause. The Education For The Handicapped Act has as its express purpose the meeting of the needs of "all" handicapped children (20 U.S.C. § 1400(b)), and its specific provisions are designed to effectuate that purpose. (See 20 U.S.C. §§ 1401(a)(1), (10); 1412; 1413(a)(4)(B); 1413(d); 34 CFR §§ 76.651-76.660; 300.1, 300.2, 300.5, 300.121, 300.124(iii, iv), 300.128(1), 300.341(b), 300.347, 300.348, 300.401, 300.450-300.452.)

At no point since October, 1987, when petitioners applied for the interpreter services, had respondent until now opposed the granting of those services on the basis

of lack of James' statutory entitlement to them. As noted by the court below, it was the stated position of respondent that if "James attended . . . a non-religious private school in Arizona, the Catalina Foothills School District . . . would assume full financial responsibility for the employment of a sign language interpreter for James." (A-4 - A-5.) But nothing in the EHA provided that the local education agency had an option, subjectively exercised, to allow, or to disallow, services to handicapped children on private school premises. As Judge Tang in his dissent stated, the EHA is "a general welfare program providing benefits to all handicapped children, whether they are enrolled in public or private schools." (A-21.)

Therefore it is clear that the issue before the Supreme Court is *solely* whether the providing of an EHA service to a handicapped child on the premises of the religious school he attends was barred by the Establishment Clause. Resolution of that important issue is clearly dispositive of this case.

## II. IT IS IRRELEVANT THAT "THERE IS NO DISPUTE AMONG COURTS THAT HAVE DECIDED THE [ESTABLISHMENT CLAUSE] ISSUE."

Respondent asks this Court to deny review on the ground that there is no dispute among courts which have decided the Establishment Clause issue posed by this case. (Br. 5-6.) But the mere absence of a conflict among circuits or other courts on a constitutional question has never been considered a reason for denial of certiorari by this Court. It is obvious that most cases which this Court selects for review are not cases involving such conflicts.

Respondent alternatively states that the Court should deny review herein because two circuits, the Fourth and the Ninth, "are in complete accord." (Br. 5.) While the fact that the two circuits may be in agreement on a particular issue is scarcely determinative of whether certiorari should be granted here, the Fourth Circuit case cited by respondent as being in accord with the decision below (*Goodall v. Stafford County School District*, 930 F.2d 363 (4th Cir. 1991), *cert. denied*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 188 (1991)), is, in significant respects, distinguishable. There EHA services were sought for a child enrolled in a non-state-approved school. Here, the school in question is state-approved. There, the providing of services of the public agency, following a private placement by the parents, was denied, on statutory and constitutional grounds, following due process proceedings. Here, subsequent to following the school district's issuance of an IEP for James and determining that he was eligible for EHA help, the state Attorney General terminated the process by his ruling that providing the services on religious school premises was forbidden by the Constitution. The respondent school district thus considered itself barred from placing James in the private school of his parents' choice, referring him to that school, or providing on its premises the EHA services he needed. Finally, *Goodall* was determined under Virginia law as well as by an interpretation of the EHA, and the opinion of the Fourth Circuit on Establishment Clause application was avoidable (and, in petitioner's view, erroneous).

### III. RESPONDENT'S CLAIM RESPECTING PRECEDENT DECISIONS OF THE SUPREME COURT DEMONSTRATES THE NECESSITY THAT THE WRIT BE GRANTED

The respondent (Br. 6-12) simply argues the merits of the constitutional issues raised by petitioners. While such argumentation will be entirely appropriate when and if certiorari is granted, its evident effect at the present stage of proceedings is to heavily underscore the importance of plenary review. Petitioners in good faith have raised (as has Judge Tang below and indeed several Justices of this Court) serious questions respecting the reach and meaning of some prior decisions of this Court interpreting the Establishment Clause. Those questions are presented graphically in the matter of James Zobrest, his parents, and the application to him of national child benefit legislation.

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### CONCLUSION

Respondent's Brief In Opposition serves but to emphasize the importance of the question presented and the need for granting review. Petitioners thus respectfully renew their request that the Petition For Certiorari be granted.

Respectfully submitted,

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